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No. 79-1792

In the Supreme Court of the United States

OCTOBER TERM, 1979

MCALESTER CORPORATION, ET AL., PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Adickes v. *Kress & Co.*, 398 U.S. 144 3

Brennan v. *Arnheim & Neely, Inc.*, 410 U.S. 512 ..... 2, 4

Duignan v. *United States*, 274 U.S. 195 3

Hodgson v. *University Club Tower, Inc.*, 466 F. 2d 745 ..... 4, 5

United States v. *Mendenhall*, No. 78-1821 (May 27, 1980) 3

Statute:

Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* 1

29 U.S.C. 203(r) 2

29 U.S.C. 203(s)(1) 2

29 U.S.C. 206 1

Miscellaneous:

S. Rep. No. 145, 87th Cong., 1st Sess. (1961) 4

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This is an action for enforcement of the minimum wage requirements of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*[2] Petitioners seek review of the determination by the district court and the court of appeals that the Aldridge Hotel in McAlester, Oklahoma, is part of an "enterprise engaged in commerce" and, accordingly, is subject to the Act. See 29 U.S.C. 206.

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[1]Hotels Service Company, Tulsa Apartments Corporation, Charles H. Alberding and J.E. Scally are also petitioners in this action.

[2]The Secretary also had charged petitioners with violating the Act's recordkeeping provisions, but the district court held that the Secretary failed to meet his burden of proof on that issue. Supp. App. B12 ("Supp. App." refers to the Supplemental Appendix to the petition for a writ of certiorari, which contains the opinion of the district court). The Secretary did not appeal from that ruling.

1. The Act provides that separate corporate units or establishments that are under common control constitute a single "enterprise" if, *inter alia*, they perform "related activities." 29 U.S.C. 203(r). *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512 (1973). An enterprise is "engaged in commerce," and therefore covered by the Act, if it has gross annual revenues of at least $250,000. 29 U.S.C. 203(s)(1).

The Aldridge Hotel is one of some 34 hotels, known as the "Alsonett Hotels," that are owned and operated by corporations controlled by petitioner Charles Alberding (Pet. App. A3).[3] The district court found that the Alsonett Hotels constitute an enterprise within the meaning of the Act (Supp. App. B19) and that the enterprise has gross annual revenues in excess of $2 million (Supp. App. B11). It accordingly held that the hotels are subject to the Act's minimum wage requirements. On appeal, petitioners

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[3]Petitioner Charles Alberding is president and petitioner J.E. Scally is vice-president of some 34 corporations. Petitioner Alberding, his wife and daughters together own a controlling interest in each of the corporations, and Alberding, his wife and petitioner Scally comprise the board of directors of each corporation. With the exception of petitioner Tulsa Apartments Corporation, which owns an apartment house, each of the 34 corporations individually owns and operates an Alsonett hotel.

The Aldridge Hotel is owned by petitioner McAlester Corporation. During a previous time period material to this action, it was owned by petitioner Tulsa Apartments Corporation. Both corporations are among those controlled by petitioner Alberding and his immediate family. Pet. App. A3; Supp. App. B3-B6.

Petitioner Hotel Services Company, which is jointly owned by petitioner Alberding's wife and petitioner Scally and of which petitioner Alberding is president, provides auxiliary services, such as engineering, insurance and financial services, to the Alsonett Hotels. Pet. App. A3.

conceded that the hotels comprise a single enterprise,[4] but argued that the only proof in the record that the enterprise's revenues exceed $250,000 annually was certain business records, which, petitioners claimed, had been improperly admitted into evidence. The court of appeals rejected this contention and affirmed the district court's decision that the hotels are within the Act's coverage (Pet. App. A3-A4).[5]

2. Petitioners now assert that the Alsonett Hotels do not constitute an "enterprise" within the meaning of the Act, because the hotels do not engage in "related activities." They argue, therefore, that it was error to aggregate the revenues of those hotels in order to meet the Act's jurisdictional minimum (Pet. 8-10). But, as noted above, petitioners failed to raise this claim in the court of appeals. The settled rule is that this Court ordinarily will not review an issue neither raised in nor considered by the court of appeals, even if it was raised in the district court. See, *e.g.*, *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927); *United States* v. *Mendenhall*, No. 78-1821 (May 27, 1980), slip op. 6 n.5. Accordingly, further review is not warranted.

3. In any event, the district court's factual finding that petitioners' hotels are engaged in related activities is manifestly correct and does not conflict with the decision of any other court. Activities are "related" within the

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[4]The court of appeals noted that "[d]efendants on appeal do not dispute the proposition that the hotels owned by Charles Alberding may be considered together with the Aldridge Hotel to constitute a single 'enterprise' " (Pet. App. A4).

[5]The court of appeals reversed that part of the district court's decision that held that the individual petitioners, Charles Alberding and Joseph Scally, are not "employers" for the purposes of the Act (Pet. App. A4-A6). Petitioners do not seek review of this ruling.

meaning of the Act if they are "the same or similar." *Brennan* v. *Arnheim & Neely, Inc., supra,* 410 U.S. at 518; S. Rep. No. 145, 87th Cong., 1st Sess. 41 (1961).[6] The activities of the individual corporations that make up the Alsonett Hotels are obviously the same or similar since, as the district court found, each is engaged in the operation of a hotel (Supp. App. B4-B5). The district court's finding was abundantly supported by petitioner Alberding's own testimony that all of the Alsonett Hotels are hotels, as their name implies, and that "all of them receive transient guests[,] all of them have desk clerks, maid service, things of that nature that are normally associated with hotels" (Tr. 58; see also Tr. 104).[7] Contrary to petitioner's contention (Pet. 9-11), testimony to the effect that some of the Alsonett Hotels have accommodations for permanent guests and make an effort to attract permanent guests (Tr. 144) is not inconsistent with their status as hotels.

Petitioners rely on *Hodgson* v. *University Club Tower, Inc.*, 466 F. 2d 745 (10th Cir. 1972), which held that the activities of a corporation engaged exclusively in the operation of a hotel and those of a corporation engaged exclusively in the operation of ordinary apartment houses were not "related" within the meaning of the Act. But that decision is not contrary to the district court's decision here, since, by petitioner Alberding's admission, each of

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[6]Activities also are related if they are "auxiliary." S. Rep. No. 145, *supra,* at 41. The district court found that petitioner Hotels Service Company was part of the enterprise because it provided auxiliary services, such as engineering, insurance, and financial services, to the Alsonett Hotels (Supp. App. B18).

[7]"Tr." refers to the trial transcript.

the corporations included in the instant enterprise operates a hotel.[8]

4. Petitioners' additional assertion (Pet. 11-13) that the district court erred in admitting the hotel business records is simply irrelevant. As the court of appeals recognized (Pet. App. A4), petitioner Alberding's admission that his hotels have gross annual revenues in excess of $2 million (Tr. 77) provided ample support, apart from the business records, for the district court's finding that the enterprise's revenues exceed the Act's $250,000 jurisdictional minimum.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[8]Indeed, relying on *Hodgson* v. *University Club Tower, Inc., supra*, the district court excluded the Tulsa Apartments Corporation (except for its period of ownership of the Aldridge Hotel) from its determination of the extent of the enterprise, because it found that, unlike the corporations that own the Alsonett Hotels, the Tulsa Apartments Corporation operates an apartment building (Supp. App. B17-B18).